OLD MUTUAL ZIMBABWE LTD
versus
THE COMMISSIONER-GENERAL OF THE ZIMBABWE REVENUE AUTHORITY
and
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 1 October 2015 and 24 February 2016

Opposed Application

AP de Bourbon, for the applicant
M Sinyoro, for the respondents

KUDYA J: This is an opposed application moved in the High Court in terms of the common law, Administrative Justice Act [*Chapter 10:28*] and s 68 of the Constitution[1]for the judicial review of the decision of the respondents of 3 December 2014 that the employee share ownership trust in the Notarial Deed of Trust of the Old Mutual Zimbabwe Limited (OMZIL) of 5 June 2012 was not an approved employee share ownership trust, AESOT, as defined in s 2 as read with s 15 (2) (jj) and para 19 of the Third Schedule to the Income Tax Act [*Chapter 23:06]*.

The applicant, a subsidiary of a worldwide group, is a duly registered local holding company of corporate entities in the fields of both life insurance and short term insurance and general investment. The first respondent is the Commissioner-General of the second respondent, a corporate body incorporated in terms of the Zimbabwe Revenue Authority Act [*Chapter 23:11*] and is as such an administrative authority under the Administrative Justice Act, *supra.*

The order sought

Initially, in addition to the declarator set out in the draft order, the applicant prayed for an order directing the first respondent to personally consider and re-examine the trust deed against the requirements of an AESOT prescribed in s 2 of the Income Tax Act and

[1] Para 23 of founding affidavit and para 22 of opposing affidavit

provide reasons for any adverse determination. In his oral submissions Mr *de Bourbon,* for the applicant, conceded that the Commissioner in charge of the department of the second respondent responsible for assessing, collecting and enforcing payment of taxes levied under the Income Tax Act rather than the Commissioner-General was required in terms of the definition of Commissioner in s 2 of the Income Tax Act to consider the application. He accordingly moved for the amended draft order and sought the following relief:

1. It is declared that the Notarial Deed of the Trust of the OMZIL Indigenisation Employee Share Scheme executed on 5 June 2012 meets all the requirements of the term Approved Employee Share Ownership Trust, AESOT, as the term is set out in s 2 of the Income Tax Act [*Chapter 23:06*].
2. It is declared that the Commissioner shall consider whether or not any employee share ownership trust submitted to him meets the requirements of the term Approved Employee Share Ownership Trust, AESOT, as the term is set out in s 2 of the Income Tax Act [*Chapter 23:06*].
3. The Commissioner shall re-examine the Notarial Deed of Trust of the OMZIL Indigenisation Employee Share Trust executed on 5 June 2012 and advise in writing within 10 days of the date of this order whether or not he is satisfied that the dominant effect or purpose of the Notarial Deed of Trust of the OMZIL Indigenisation Employee Share Trust submitted to him will be accepted by the second respondent for the purposes of section 15 (2) (jj) and paragraph 19 of the Third Schedule of the Income Tax Act [*Chapter 23:06*], and if he is not so satisfied to provide reasons in writing for that decision.
4. The second respondent shall pay the costs of this application.

The background

The Indigenisation legislation and the OMZIL Indigenisation Employees Share Trust

The Indigenisation and Economic Empowerment Act [*Chapter 14:33*] came into force on 17 April 2008. The Indigenisation and Economic Empowerment (General) Regulations SI 21/2010 were promulgated on 29 January 2010 and have been amended several times over the years. The Act and regulations seek to vest in an agreed time frame majority equity in the issued share capital of companies incorporated in Zimbabwe to indigenous Zimbabweans as

defined in s 2 of the Act.[2] In order to comply with this Act the applicant created the OMZIL Indigenisation Employees Share Trust[3]on 5 June 2012, regulated in terms of its self-made trust rules. The trust was registered in the protocol of the notary public on 14 June 2012. The two main objectives of the trust were firstly to satisfy the requirements of the indigenisation legislation of moving majority shares from the control of foreign shareholders to local control and secondly as a skills retention measure[4] wherein the employee would hold a stake in the company and earn income from the shares allocated to him or her. The applicant formed additional trusts for the benefit of senior and former employees, a Youth Fund[5] and a special purpose company. These vehicles were to hold 25 % of the issued share capital of the applicant equivalent to US$60 million. On 15 January 2014, the applicant submitted an Indigenisation Implementation Plan[6] inclusive of the contemplated method of payment to Old Mutual (Netherlands) BV [OMBV] for the equity in question for the approval of the Minister of Youth Development, Indigenisation and Economic Empowerment. It was approved by the Minister on 2 April 2014[7]. By 25 June 2014 these shares had purportedly been sold by OMBV to the trusts.[8]

The present application is, however, concerned with the OMZIL Indigenisation Employees Share Trust only. This trust was designed to acquire 14 446 250 shares representing 4.35% of the total issued share capital of applicant at a price of $1.12 per share[9]. It was run by a board of trustees who acted in terms of the trust deed and its rules and on the directives of the directors of the applicant. The trustees were mandated to acquire by purchase or donation, hold, control and exercise membership rights over the unissued but act on the specific instructions of beneficiaries over the issued scheme shares, and at an appropriate future date transfer the scheme shares to eligible employees[10]. In addition they

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[2] "Indigenisation" means a deliberate involvement of indigenous Zimbabweans in the economic activities of the country, to which hitherto they had no access, so as to ensure the equitable ownership of the nation's resources; "Indigenous Zimbabwean" means any person who, before the 18th April, 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest;

[3] Annexure OM1 on 5 June 2012 [p 15-42].
[4] Trust deed p24-25 of application and p 90 letter of 3 July 2014
[5] Para 1.1. 41 p 23 of application
[6] Defined para 1.1.12 of annex OM1 at p 19-20.
[7] Annexure OM 2, p 43 and 44
[8] OM4 W Fuller's account on p 50
[9] Clause 1.1.38 and 11.1.1 of trust deed OM1 pp 23 and 33 of the application
[10] Clause 4.3 of trust deed

were empowered to receipt the purchase price from the employee, pay dividends to beneficiaries, register undistributed scheme shares in the trustees' names, settle interest free loans, purchase more shares, and accept any cash grants and interest free loans from the applicant and its subsidiaries, invest surplus funds, keep various books of account some of which are listed in clause 11, submit signed audited financial year accounts to the directors of the applicant and submit tax and statutory obligations. The directors of the applicant could augment the capital and meet the administration costs of the trust without reducing the benefits of the scheme shares. In addition they had untrammelled and overarching powers to make and interpret rules and regulations for the good governance of the trust[11], by resolution to identify eligible and invite participating employees, inspect trust books of account, direct the investment portfolio of the trustees and without prejudicing vested rights, terminate the scheme[12].

The application for an advance tax ruling

On 9 May 2014, the applicant submitted an application for an advance tax ruling[13] to the respondents. It sought guidance on the income tax and capital gains tax implications, based on four postulations, of the shares vesting in the beneficiary employees on 25 June 2014 and whether they required capital gains tax clearance certificates to effect such transfers. On 24 June 2014[14] the first respondent ruled on the four postulations. The first postulation was whether the full value of the shares at the time of vesting formed part of the gross income subject to PAYE in the month of vesting. The first respondent ruled on the basis of the provisions of s 8 (1) (b) as read with s 8 (1) (f) (iv) and para (1) on the definition of remuneration and (3) of the 13th Schedule to the Income Tax Act that the full value of the shares formed part of the gross income subject to PAYE on 20 August 2012, the date on which the offer of shares was accepted by each employee. The second postulation was whether shares sold by the employees to meet PAYE obligations from the scheme share benefit was liable for capital gains tax to which she ruled on the basis of s 8 (1) (a) as read with s 22B of Capital Gains Tax Act [*Chapter 23:01*] that the proceeds would constitute gross capital amount liable for capital gains tax on the date of sale. The third postulation was whether the employees who sold on vesting date were liable for capital gains tax and required

[11] Clause 6.3 of trust deed
[12] Clause 10, 18 and 22 of the trust deed
[13] Annexure A of opposing affidavit p86-89 of the application
[14] OM3

a capital gains tax clearance certificate to facilitate transfer of the shares. On the basis of s 22C (5) of Capital Gains Tax Act she ruled that they were liable and transfer would have to be effected on the strength of capital gains tax clearance certificate. The fourth postulation was whether the employees who would hold onto their shares would be liable for capital gains tax on transfer into their names and would require capital gains tax clearance certificates before taking transfer. She advised that such would also be liable for capital gains tax and would require capital gains tax clearance certificates to take transfer.

The ruling resulted in the meeting of 25 June 2014[15] after which applicant applied for approval of the trust deed as an AESOT purportedly under the definition in s 2 of the Income Tax Act on 27 June 2014[16]. The application was responded to on 28 July 2014[17] eliciting the rebuttal of 4 August 2014[18] from the applicant.

The meeting of 25 June 2014

In the meeting of 25 June 2014, the applicant sought to benefit from the tax breaks embodied in s 19 of the 3rd Schedule to the Income Tax Act and s 10(k) of the Capital Gains Tax Act. In order to eliminate the PAYE income tax obligation of both its loyal and disqualified employees it erroneously[19] sought, in the main, approval of the trust as an AESOT backdated to the award date of 25 June 2012 and in the alternative recognition of the accrual date from the award date to the release dates of 25 June 2014, 25 June 2015 and 25 June 2016. All eligible employees were awarded shares valued at US$1.12 in July 2012 with a prospective value of US$1.31 on the first release date for free. The effect of the tax ruling was that the employees were deemed to have received remuneration equivalent to the value of the shares on the award date for which PAYE was due on that date. The PAYE would be met from the disposal of trust shares of equivalent amount, which in turn attracted payment of capital gains tax. The applicant feared that the employees would feel cheated and opt out of the scheme rather than borrow money to meet both income and capital gains tax obligations for shares they had not taken delivery of and in the process jeopardise the applicant's approved indigenisation plan.

The respondent was not moved by the representations made by the applicant in that meeting in view of clause 8.1 of the trust rules which reads:

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[15] Annexure OM4 p50 -53
[16] Annexure OM5-p 54-55
[17] Annexure OM6-56-7
[18] Annexure OM7 p 58-9]
[19] Third bullet under issues tabled by OM team annexure OM 4 p50

> "Notwithstanding any other provision contained in these rules, and notwithstanding the fact that the shares will be registered in the name of the Trustees during the restricted period, beneficial ownership of all restricted shares shall….vest in participants with effect from the applicable award date in respect of those shares."

In consequence of this meeting, on 27 June 2014 the applicant applied for approval of the trust as an AESOT with effect from 5 June 2012 to the appropriate Commissioner purportedly in terms of the definition of an AESOT in s 2 of the Income Tax Act. It was apparent from the contents of this letter and that of 4 August 2014 that the applicant was essentially seeking satisfaction of and not approval from the Commissioner of the trust as an AESOT. In his response of 28 July 2014 the appropriate Commissioner conceded on the basis of the trust deed and letter from the indigenisation minister that the arrangement between the applicant and its employees was embodied in a notarised trust deed and that its dominant purpose was to enable employees to partake in or receive profits or income from the operations of the company. He was, however, not satisfied that the profits or income out of which payments would be made to each employee were pooled nor that each employee possessed the right or interest held in trust which he could sell to the trust. He underscored that tax exemptions in both Acts only applied to shares dealings carried out within the scheme.

A rebuttal to this letter was dispatched by the applicant on 4 August 2014. On 20 August and 22 October 2014[20] the first respondent requested information of trusts alleged on 25 June 2014 to have been approved by the first respondent, financial statements for the trust from inception, information on the shares that were transferred to the employees and details of the transactions of all the shares that were sold or bought within the trust to enable him to make a decision in respect of the application for the approval of the scheme as an AESOT.

On 3 December 2014[21] Mr Chiradza, the appropriate Commissioner, responded to the further response of 4 August and the additional information supplied in accordance with the requests of 20 August and 22 October 2014. He determined firstly that the Commissioner lacked the authority to approve the scheme as an AESOT and secondly that the scheme, on the information supplied, failed to meet the requirements of s 2 (a) and (b) and especially of 2 (b) (ii) of the definition of an AESOT as found in the Income Tax Act. He disqualified the scheme under s 2 (b) (ii) on the basis of the ownership structure of the trust shares.

[20] Annexures OM 10 and OM 11 pp 64 and 65
[21] Annexure OM 12 pp 66-67

The facts

These are common cause. The applicant created a series of trusts to give employees a stake in the applicant including the one under consideration. It was common cause that the trust deed the subject of this application was notarised.

On 25 June 2012 applicant dispatched offer letters with the terms and conditions of the scheme together with acceptance letters. The entitlement to the shares were dependent on good service of the employee and performance of the Group during the entire restricted period. The entitlement of employees could be reduced in whole or in part if in the reasonable opinion of the applicant's directors the Group or any company within the Group performed below expectations. The restricted period commenced to run on 25 June 2012, the award date and ended firstly on 25 June 2014, secondly on 25 June 2015 and lastly on 25 June 2016, the vesting dates. Actual ownership of the shares vested in each employee still within the Group in three equal instalments on these dates while entitlement to the benefits of ownership accrued on the award date. The acceptance of the conditional offer was due by 20 August 2012. The entitlements to the benefits of ownership that accrued immediately on acceptance of the offer were the shareholder's right to vote and receive dividends. Entitlement was lost during the restricted period by voluntary resignation or disciplinary termination without serving the entire restricted period. On the other hand retirement in consequence of age and illness, retrenchment or death within the restricted period did not affect such an employee's entitlement. There were employees who left the Group during the restricted period through voluntary resignation and disciplinary termination who lost deferred ownership of the trust shares that had been allotted to them on the award date. The employees received dividends for which withholding tax was deducted and paid over to the respondents.

It was common cause that the applicant through its group tax manager Mr Chigavazira erroneously[22] sought approval of the scheme as an AESOT from the first respondent by way of an advance tax ruling in terms of s 34D of the Revenue Authority Act.[23] It was common cause that thereafter the essence of the interactions between the parties revolved around the applicant's request, encapsulated in the letter of 27 June 2014, for the recognition of the trust as an AESOT with effect from the award date of 25 June 2012, which recognition was refused on 3 December 2014.

[22] Para 13 and para 18 of Founding Affidavit on p7-8 and para 11 of opposing affidavit at p 77
[23] Annexure OM3 of founding affidavit and Annexure A of opposing affidavit.

It was common cause that the duty to be satisfied that the trust was an AESOT fell on the Commissioner for Domestic Taxes, Mr Chiradza, who incidentally authored the letter of 3 December 2014 and personally took an active and leading role in all the discussions between the parties. The accusation in para 24 of the founding affidavit persisted with in para 15 of the answering affidavit that the first respondent abrogated his personal responsibility in this regard was demonstrably erroneous.

In para 25 of the founding affidavit the first respondent was attacked in his capacity as an administrative authority of failing to act lawfully, reasonably, and in a fair manner by imposing his personal statutory obligation on a third party; negating to apply his mind to the real issue before him, desiring to maximise revenue collection at the expense of the benefits due and in the process rendering a substantially unfair decision to the applicant and its employees. The applicant further averred that the disqualification of the trust as an AESOT was grossly irrational and unreasonable. Again, the attacks in para 25 of the founding affidavit persisted with in para 17 of the answering affidavit against the person of the first respondent to the extent that he was not required to personally consider the matter were misdirected.

In view of the concession that the first respondent was not required to personally consider the application for approval, all these accusations fall away. The decision was made by the appropriate Commissioner. Even though the attacks were directed at the person of the first respondent, I can properly determine them as they are directed at the decision maker, the decision making process and the decision itself.

The respondent disputed that the decision maker acted unlawfully, unreasonably, unfairly and irrationally. They averred that he applied his mind to the real issues and came up with a rational and well-reasoned decision. They further averred that he was actuated by the desire to render a correct interpretation of the provision in question rather than the enhancement of revenue collection.

The issues

The main issue for determination is whether the trust deed of the applicant constitutes an approved employee share ownership scheme as defined in s 2 of the Income Tax Act with effect from 25 June 2012, being the date on which the trust shares were awarded to the eligible employees. The respondents however raised one preliminary point in their written heads of argument and several others thereafter in oral argument.

The preliminary points

Raised in the heads

In their written heads of argument, the respondents took the preliminary point that the application was not properly before the court. They averred that the applicant was in essence seeking a review under the guise of a declarator. They cited six[24] instances in the application that demonstrated that the present application was in substance an application for judicial review rather than a declarator. These were in reference to s 3 of the Administrative Justice Act, s 68 of the Constitution and common law grounds for review of alleged unreasonableness, lack of substantial fairness and failure to give reasons for the decision by the respondents and reliance on an application for review case of *Director of Civil Aviation v Hall*.[25] The cusp of the preliminary point was that the applicant was precluded by law from moving judicial review of the Commissioner's administrative decision of 3 December 2014 other than by way of Order 33 r 257 of the High Court Rules. They submitted that failure to comply with the provisions of r 257 was a fatal irregularity and prayed for the dismissal of the application.

The preliminary point was properly abandoned in oral argument by Mr *Sinyoro*, for the respondents on the strength of the decision of the Supreme Court in point in *Arafas Mtausi Gwaradzimba NO* v *Gurta S*C 10/2015. At p 6 of the cyclostyled judgment Gwaunza JA stated that:

> "My understanding of this provision is that the High Court Act contemplates and permits review proceedings that are brought before it in terms of "any other law." Specifically, judicial review may be done in terms of another statute, for instance the Administrative Justice Act, as happened *in casu*. Further to this, and as clearly indicated above in subsections (1) (2) of s 27, grounds for review are not limited to those particularised in that section. Other laws can properly dictate the consideration of, or specify, other grounds on the basis of which proceedings of a lower court or tribunal may properly be reviewed."

And at p 7:

> "However, for reasons stated above, I am not persuaded that the only form of review proceedings in the circumstances of this case, would be those in terms of Order 33 r 257 of the High Court Rules."

It is clear to me that our Supreme Court has definitively held that there are many routes to access judicial review in the High Court. Thus an applicant may elect to follow Order 33 of the Rules of Court or s 4 (1) as read with s 2 (2) of the Administrative Justice Act

[24] Para 11 of respondent's written heads p 126 of the application.
[25] 1990 (2) ZLR 354 (S)

or the common law or s 68 of the Constitution of Zimbabwe. In the instant case the applicant was within its rights and did elect to follow the provisions of s 4 (1) as read with s 2 (2) of the Administrative Justice Act. The concession was properly made.

Raised on the turn

The relief sought

In oral submissions, Mr *Sinyoro* submitted that the present application was premature as the applicant did not exhaust the domestic remedies prescribed in the Administrative Justice Act. He contended that the applicant was required to avail other satisfactory information to the respondents showing that the scheme was in compliance with either of the provisions of s 2 (b) (ii) of the Income Tax Act otherwise para 3 of the draft order would be superfluous. He further contended that in seeking such relief the applicant made the tacit admission that full and frank disclosure to enable the respondent to make an informed decision on the points in dispute had not been made. In any event, it was common cause that the first relief cannot be granted together with the second and third relief. Once the court declares that the scheme meets the requirements of an AESOT as defined in s 2 of the Income Tax Act, it would have usurped the administrative functions of the Commissioner and in the process rendered redundant paras 2 and 3 of the draft order. The power of the Commissioner to accept or reject the scheme would have been emasculated. While I agree with Mr *de Bourbon* that the final order is in the discretion of the Court, the applicant had a duty to set out clear and consistent relief in the draft order by seeking the last two prayers in the alternative rather than as a seamless whole.

Service on the Attorney-General

The second preliminary point raised for the first time in oral argument was that the failure to serve the Administrative Justice Act review application on the Attorney-General purportedly in terms of s 11 of that Act rendered the application nugatory. I agree with Mr *de Bourbon's* submission that the section permits the intervention of the Attorney-General in the proceedings brought in terms of the Act but does not mandate his joinder by any of the parties to the proceedings. The section reads:

> "9. Intervention by Attorney-General
> In any proceedings brought under this Act the Attorney-General shall be entitled to be heard by the court and, whether or not he has exercised such right, the Attorney-General

> shall have the same right of appeal relating to such proceedings as if he or she had been a party to the proceedings."

The method by which he intervenes is not set out and in my view awaits the promulgation of the regulations contemplated in s 10 of the Act. It is not mandatory that he be served with such an application otherwise he would not have been granted the right of appeal where he does not exercise such right. The belated preliminary point is dismissed for lack of merit.

The absence of a letter of demand

The third belated preliminary point was that the respondents were not placed in *mora* by the applicant before the institution of this appeal. I am satisfied that the present application is not one sounding in money where a letter of demand precedes a claim for interest before the service of summons. Again, this preliminary point is dismissed for lack of merit.

The merits

The two decisions

In the letter of 3 December 2014 the Commissioner for Domestic Taxes made two decisions. The first was that the respondents were not empowered by law to approve an AESOT. He was correct. In fact no administrative authority is empowered by any law to grant such an approval. In any event no such approval is required. An AESOT is merely an appellation described and defined in s 2 of the Income Tax Act. The use of the term approved does not indicate that approval is required. The role of the Minister for Indigenisation is not to approve an AESOT but to certify compliance of indigenisation plans with the requirements of the indigenisation legislation. He is certainly not authorised to approve an AESOT.

The second decision was framed thus:

> "In your letter you argue that compliance with the requirements of (b) (ii) in the definition of 'approved employee share ownership trust' is sufficient to satisfy the Commissioner that the trust qualifies for the purposes of the Income Tax Act. I do not agree with this viewpoint having considered your submissions on the question of ownership of the share.
> …….
> In view of the foregoing, I am still not satisfied that the OMZIL Indigenisation Share Ownership Trust meets the requirements in the Act. I therefore reconfirm the position in my earlier response to you that I am not in a position to approve the trust and would not if required recommend its approval. I also advise that the ruling issued on 24 June 2014 in respect of the application remains valid."

In an earlier response, the same Commissioner had determined on 28 July 2014 that:

> "It is however not obvious from the information submitted that the interests of the employees will be held in trust for the employees as required in the definition. It is also not clear that profits or income from dividends is pooled."

The relevant legislation

The three sections of the Income Tax Act relevant to the determination of the issue on review are s 2, s 15 (2) (jj) and para 19 to the Third Schedule. Section 2 of the Income Tax Act was amended with effect from 1 January 2002. It introduced the definition of an approved employee share ownership trust AESOT and a new s 15 (2) (jj) in the Income Tax Act effective on the same date. It latter introduced para 19 to the Third Schedule of the Act that was operationalised on 1 January 2003. These sections provide as follows:

> "Section 2:
> "approved employee share ownership trust" means an arrangement embodied in a notarised trust deed which satisfies the Commissioner that its dominant purpose or effect is to enable employees of a company or group of companies to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the stock, shares, debentures or any property, including money, of the company or group of companies concerned where—
> *(a)* the stock, shares, debentures and any property, including money, are held in trust for the employees; and
> (*b*) the arrangement has either or both of the following characteristics—
> (i) the employees' contributions, if any, and the profits and income out of which payments are to be made are pooled;
> (ii) each employee has a right or interest, whether described as a unit or otherwise, in the stock, shares, debentures and any property, including money, held in trust for the employee, which may be acquired or disposed of under the arrangement ;
>
> Section 15 (2) (jj):
> The deductions allowed shall be—
> (*jj*) an amount representing the fair value of any stock, shares, debentures, units or other interest paid or given by the taxpayer to an employee of the taxpayer or for the benefit of an employee of the taxpayer pursuant to an approved employee share ownership scheme or trust.
>
> Third schedule (section 14)
> Exemptions from income tax
> 19. An amount received by or accrued to or in favour of an employee participating in an approved employee share ownership trust from the sale to or redemption by the trust of any stock, shares, debentures, units or other interest of the employee in the scheme or trust of any stock, shares, debentures, units or other interest of the employee in the trust."

It was common cause that the effect of s 2 is that until the Commissioner accepts the scheme, the tax relief provided in s 15 (2) (jj) and para 19 of the Third Schedule is beyond the enjoyment of the employer and employee. The tax benefits in the present case were that the fair value of the shares purchased or donated by the employer to its employee through an AESOT constituted a deductible expense for the employer. In addition, in terms of para 19 to

the Third Schedule, the employee participating in an AESOT is exempted from paying income tax on the amount equivalent to the value of the trust share he receives or which accrues to him or is in his favour, which is held on his behalf by the trust. Again, under the Capital Gains Tax Act, a sale of such a share does not attract capital gains tax. Parliament thus wished to grant employers and employees who concluded employee share ownership schemes or trusts relief from income tax on one hand by providing exempt income for employees and on the other the right to deduct costs of the arrangement to the employer.

Mr *de Bourbon* submitted that the import of the decision of 28 July 2014 was that the requirements of the Income Tax Act would be met by compliance with both para (a) on the one hand and both sub requirements of (b) (i) and (b) (ii) on the other of the definition of an AESOT in s 2 of the Income Tax Act. He contended that the use of the words "it is also" in that letter demonstrated that the Commissioner rendered the phrase "either or both" as "both". It seems to me that even in that letter the reference firstly to shares held in trust and the second reference to the pooling profits or dividend income should be read in the overall context of the discussions of 25 June, the letter of 27 June and 3 July 2014. It is apparent from these letters that the applicant made the point that the Commissioner had to be satisfied that one of these two requirements was present. To and before the Commissioner the applicant sought to establish that the shares held in trust for the eligible employees could be sold to or bought by the trust between the award date and the vesting date. The Commissioner's response in context was that the oral and written information availed to him did not establish that the shares held in trust could be sold by each participating employee to the trust or purchased by the trust from each such employee. In addition, and for completeness, he further pointed out that in his assessment the other disjunctive sub requirement for the pooling of profits or dividend income was absent. In any event, the attempted reliance on the decision of 28 July for the review of the decision of 3 December 2014 is both incomprehensible and misplaced.

The essential requirements of an AESOT

In the letter forming the subject of this review The Commissioner, Mr Chiradza, determined without reference to the pooling sub requirement that even the sole sub requirement relied upon by the applicant of holding the shares in trust capable of sale to or acquisition by the trust had not been established. In my view, the submission made by Mr *de Bourbon* that the Commissioner Domestic Taxes rendered the phrase "either or both" as

"both" would have merit had the Commissioner found one of the sub requirements present but had nonetheless proceeded to find that an AESOT had not been established. The submission that the Commissioner rendered the phrase "either or both" as both was hotly disputed in both the respondents written heads of argument and oral submissions.

In my view, the requirements that should trigger satisfaction by the Commissioner are:

a. the existence of a notarised trust deed, and
b. whose dominant purpose or dominant effect is for employees to share in the profits or income of the company emanating from trading operations and share dealings of the company, and
c. in which the shares are held in trust for the employees and
d. either,
    i. any contributions of the employees or profits or income from which disbursements come are pooled or
    ii. each employee has a right or interest in the shares held in trust for him capable of being sold to or bought by the trust

Resolution of the issues

I proceed to assess whether any of these requirements were met by the trust deed of the applicant.

a. The existence of a notarised trust deed

It was common cause that annexure OM1 adequately meets this requirement. The aggregate shares are allocated to the Trust by resolution of the directors of the applicant and enjoy any dividends declared or rights issues offered by the applicant. The Trustees allot the shares to each eligible employee who immediately becomes eligible for any declared dividends notwithstanding that ownership is deferred to the vesting dates and the employee is precluded from pledging, ceding, selling, donating exchanging, disposing or alienating them in any manner whatsoever. The dividends are paid directly to the employees and are not refunded in the event that they fail to meet the vesting requirements after payment has been made. The beneficiaries were eligible employees in Zimbabwe nominated by the applicant's directors who were employees on 1 January 2012. All the employees who were employees on 1 January 2012 were deemed nominated by the directors of the applicant with effect from the award date of 25 June 2012. The directors furnished details of such employees and instructed

trustees to allocate to each employee his allotment as determined by the directors. The trustees' issue an award certificate but shares are held in trust for the restricted period for which they remain registered in the name of the trustees. The shares would be released to each employee in three equal batches on 25 June 2014, 25 June 2015 and 25 June 2016 and registered in his name.

b. Satisfies the Commissioner that the dominant purpose or dominant effect is for the employees to share in the profits or income emanating from the trading operations or share dealings of the company

It was again common cause that in order to fulfil this requirement the Commissioner had to be satisfied that the dominant purpose or dominant effect of the trust was for employees to share in the profits or income of the company or its subsidiaries. The parties were agreed that this requirement was met. The concession was made in the letter of 28 July 2014 by the appropriate Commissioner and by Mr *Sinyoro* in his oral submissions. I, however, hold a contrary view. It seems to me that the dominant purpose for forming the trust was not for the employees to share in the profits or income of the applicant. Rather it was for the applicant to comply with the requirements of the indigenisation legislation. This was further confirmed by the inherent fear expressed by the applicant that the failure to recognize the trust as an AESOT jeopardised the approved indigenisation plan. Again, the expressed dominant result of the formation of the trust was to retain staff in the applicant and its subsidiaries[26] by giving them a stake in the company. In my view, the sharing of profits was an aside that was inconsistent with the untrammelled power wielded by the directors of the applicant to reduce in whole or in part the entitlement of the eligible employees to trust shares during the entire restricted period if in their reasonable opinion the applicant or any of its subsidiaries performed below expectations. It is my further view that the provision of the restricted period in the trust deed was inconsistent with a dominant purpose or effect of sharing in the profits of the company. Despite the concession made by the respondents, I am not satisfied that the applicant established that the dominant purpose or effect of the trust was to enable the eligible employees to share in the income or profits of the applicant.

[26] Trust deed OM 1 and letter of applicant of 3 July 2014, annexure B to opposing affidavit at p 90

c. In which the shares are held in trust for the employees

To establish this requirement, the applicant was obliged to satisfy the Commissioner that the donated or purchased shares were as a matter of hard fact transferred to the trust and held by the trustees. The documents supplied to the Commissioner and to this Court do not establish that the 14 446 250 shares purportedly sold by OMBV to the trust by 25 June 2014 had been transferred to the trust and registered in the names of the trustees. That there were no shares held in trust for the employees is apparent from the absence of any share certificates in the names of the trustees and the purported direct payment of dividends by the applicant to the prospective beneficiaries rather than to the trust. I, therefore, find that this essential requirement was not established by the applicant.

d. either,

i. any contributions of the employees or profits or income from which disbursements come are pooled or

An employee with a stake in the equity of his employer is entitled to dividend income. *In casu* each eligible employee purportedly had such a stake from the award date and was entitled to dividend income distributable to him by the trust. There was no evidence that any such income was received by or accrued to the trust. There was no evidence that any dividend income was pooled in the trust. The audited financial statements of the trust from the time it started operating, the information on shares in the hands of employees and share dealing transactions of the trust requested in the letters of 4 August and 22 October 2014 and subsequently submitted to the Commissioner did not disclose such a pool. Rather the evidence at hand was that the applicant paid the dividends directly to each employee and withheld income tax which it remitted to the respondents. In the absence of such a proven pool, the Commissioner was properly dissatisfied that the trust was an AESOT as contemplated in part by s 2 (b) (i).

ii. each employee has a right or interest in the shares held in trust for him capable of being sold to or bought by the trust

The applicant sought recognition of the trust as an AESOT on the basis of the alternative requirement set out in s 2 (b) (ii). The import of this requirement is simply to avail each eligible employee a right or interest in the shares capable of disposal to or acquisition by

the trust. Mr *de Bourbon* contended in oral argument that the effect of the right or interest in the shares conferred by clauses 17, 18 and 19 of the trust deed, in tandem with all trusts, was to deny ownership of the trust assets, the shares, to the beneficiaries, the employees until the vesting dates.[27] The inarticulate premise in the contention is that neither the employee nor the trust could sell or purchase his rights in the share, respectively, during the restriction period. Rather the employee had the beneficial right or interest to receive ownership into his personal name and in the interim, dividends on the shares. These two rights are not synonymous with the express rights of disposal and acquisition reposed in s 2 (b) (ii) of the definition of an AESOT in the Income Tax Act. The employee could not dispose of the "right" he had in the share to the trust before the vesting date. He could not sell what he did not own. The alternative requirement was not capable of fulfilment before each vesting date. The first vesting date fell on 25 June 2014. It was only with effect from that date that the trust could be regarded as an AESOT provided the applicant supplied information of such vesting to the respondent. That was the point made in para 27 and 28 of the respondent's written heads and reiterated by Mr *Sinyoro* in his oral submissions.

In other words, the issue before the Commissioner was not a matter of law only as submitted by Mr *de Bourbon* but of both law and fact as submitted by Mr *Sinyoro.* The thrust of the applicant's submissions was that the respondent misinterpreted the law and the Court on the authority of *Director of Civil Aviation* v *Hall* 1990 (2) ZLR 354 (SC) at 361 was in a better position to determine the matter and grant an order in terms of the amended draft order with costs.

The rejoinder of the respondent was that it was a matter of fact. The appropriate Commissioner considered documents submitted and discussions held and found no factual basis that either of the sub requirements in s 2 (b) (ii) of the definition of AESOT in the Income Tax Act had been met. Rather he was advised in the meeting of 25 June 2014[28] that bad leavers and those who left prematurely lost out on the deferred promise of entitlement. The promise did not constitute a right or interest and could not be acquired or disposed of under the trust as required in the definition.

In both their written heads and in oral argument, both counsel were agreed on the interpretation of section 2 (b) of the definition of AESOT in the Income Tax Act. Either or both means that the applicant would satisfy the requirement if only one of the sub-paragraphs

[27] Clause 17.4 and 19.2.4 of the trust deed
[28] P 51 of the application

in s 2 (b) was met. However, it seems to me that the applicant simply failed before the Commissioner and in this Court to establish as a matter of law that each employee including the bad leavers was capable of selling his allotment to the trust or that the trust could buy his allotment from him before the share vested. In addition, the applicant failed to establish on a balance of probabilities that in the two years between the award date and the first date of vesting or for that matter even until the date of the determination any shares had been bought from any employee by the trust or sold to the trust by any employee. It thus failed to establish the factual existence of sales and acquisitions before the date of vesting between the trust and any one of the employees. It could not do so because the structure of the ownership of the trust shares before vesting militated against such a disposal to or acquisition by the trust. There is an absence of information establishing s 2 (b) (ii) of the definition of an AESOT as found in the Income Tax Act.

It seems to me that applicant acted under the erroneous belief that satisfaction for the Commissioner is derived from a desk review of the platitudes, promises and intentions set out in the trust deed and its accompanying rules. In my view, the applicant, is also required to submit concrete facts of the fulfilment of the promises and implementation of the intentions. In his decision of 3 December 2014 the Commissioner for Domestic Taxes was not satisfied that the ownership of the scheme conferred on the employee the power to dispose of his right or interest in the share to the trust or for that matter for the trust to acquire such right from him. I am unable to fault his finding. He examined the trust deed and rules and all the documentation supplied to him by the applicant. He did not abrogate his powers to some other functionary. He acted lawfully, fairly and reasonably and with promptitude and provided reasons for his decision to the applicant. His administrative action met the requirements of procedural and substantive fairness.

In my view, the Commissioner was correctly dissatisfied that during the period between 25 June 2012 and 25 June 2014 the arrangement in the trust deed constituted an AESOT as defined in s 2 of the Income Tax Act.

Disposition

Accordingly, the application is dismissed with costs.

Atherstone and Cook, applicant's legal practitioners
Sinyoro & Partners, respondent's legal practitioners